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IN THE

Supreme Court of the United States

October Term, 1998

LARRY B. AND SHIRLEE ALEXANDER, et al. and
WILLIAM AND CHARMOND ADKINS, et al.
Petitioners,

v.

UNITED STATES OF AMERICA, et al.
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PRIVATE OWNERS' REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

The decision below is both sweeping and unprecedented: no court has previously given Indian tribes the right to enter upon private property to take resources from the land itself. By authorizing Indian tribes to enter upon the privately owned beaches of thousands of Washington residents to take half the naturally occurring shellfish, the Ninth Circuit decision conflicts with decisions in other circuits construing treaty language far broader than that at issue in the Stevens treaties. It also conflicts with this Court's decisions limiting tribal access to narrowly defined private lands to harvest anadromous fish that could not otherwise be taken. This Court should grant the Private Owners' petition.

REPLY TO STATEMENT OF THE CASE

The "heavily fact bound" inquiry that the Tribes claim underlies the district court's decision (Tribes' Brief at 1) is illusory. The district court itself found the historical record to be largely undisputed.[1] The parties' dispute in the district court centered not on the historical record but the inferences of "intent" that were to be drawn from those historical facts.

The respondent Tribes falsely characterize the Stevens treaties as focussed exclusively on protecting their ability to

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[1] *See* App. 66 ("the parties agree that the minutes of the treaty negotiations reflect no specific discussion of the Shellfish Proviso"); App. 70 ("Both sides characterize Stevens as a self-conscious historical actor who proceeded cautiously, guided by a vision for the future of Washington Territory"); App. 71-72 ("The parties also agree that the United States negotiators anticipated industrial and urban development in the relevant geographical area, and expected that mills, ports and eventually cities would be erected on the tidelands.").

catch fish. The United States admits that the treaties were negotiated with the intent to quiet title to the Territory and provide those Tribes who were ceding their ancestral lands with reservations and a livelihood. The Stevens treaties thus provided for the allotment of farmland to the Indians while protecting their right to continue hunting and fishing away from their reservations, particularly for anadromous salmon which served as the staple of their diet and the center of their religion and culture. App. 169, 180, 189, 195; ***Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n***, 443 U.S. 658, 665-66 (1979).[2]

Further, the respondents' contention that the Stevens treaties were intended to forever provide the Tribes access to natural shellfish beds cannot be squared with the undisputed historical record. The treaties were designed to facilitate settlement, which at treaty time meant the use and occupation of tidelands, even if they happened to contain the Tribes' historical shellfish beds.[3]

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[2] In the treaty minutes the Indians consistently spoke of the importance of catching salmon. Shellfish are hardly mentioned, nor is there any evidence in the minutes that the treaty Indians understood the practices of the shellfish industry, whether conducted on the East Coast or at Shoalwater Bay, far from the treaty area of Puget Sound (Ex. D-064)

[3] The district court found:

> [T]he Tribes appear to have conceded that some of the development along the tidelands, but not all, has extinguished their right to take fish from those particular areas.

App. 72.

The historical record thus belies the respondents' contention that the treaty negotiators envisioned preserving in perpetuity a tribal right to enter upon and harvest shellfish from all natural beds, wherever located. The individual state's authority to extinguish such rights in tidelands was well established. *See* ***Dutton v. Strong***, 66 U.S. 23, 32 (1861) ("our ancestors . . . soon found it indispensable, in order to secure these conveniences, to sanction the appropriation of the soil between high and low-water mark to the accomplishment of these objects."). Each state dealt with the issue of tideland ownership in the manner best suited to its particular geographic, economic and cultural needs. *See* ***Shively v. Bowlby***, 152 US 1, 26 (1894).

Washington's decision to authorize private ownership of tidelands, first for filling and dredging in the nineteenth century, and then to promote the residential development of waterfront properties in this century, was no historical anomaly. The treaty drafters' clear expectation that the future state of Washington could, by authorizing the private development of tidelands, terminate a Tribe's ability to harvest shellfish creates a paradox that the district court characterized as "perplexing" (App. 72) and that the respondents now ignore. Indeed, until this case neither the Tribes nor the United States had contested the State's undisputed authority to create in tidelands private property interests that eliminate natural shellfish beds.[4]

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[4] Contrary to the respondent Tribes' contention (Tribes' Brief at 18 n.20), the natural shellfish beds located on the Private Owners' soil run

(continued...)

REPLY ARGUMENT

A. The Court Of Appeals' Decision, An Unprecedented Extension Of Tribal Usufructuary Rights To Privately Owned Property, Conflicts With Decisions Of Other Circuits And Is Unsupported By This Court's Decisions.

The rulings below directly conflict with the decisions of the Seventh and Eighth Circuits under treaty language far more sweeping than the qualified right of taking shellfish, that was limited by the proviso in the Stevens treaties. The rulings below cannot be supported by this Court's decisions in ***United States v. Winans***, 198 U.S. 371 (1905) and ***Seufert Brothers Co. v United States***, 249 U.S. 194 (1919), where the United States disclaimed the sweeping off-reservation tribal right to enter upon thousands of privately owned parcels of land.

The respondents cannot avoid the conflict created by the Seventh and Eighth Circuits' forceful rejection of treaty rights to take resources on private lands by distinguishing these cases on the basis of "different treaty language." (Brief of United States at 23) The Seventh and Eighth Circuits held that Indian tribes were given no right to fish, hunt or gather on private lands under treaty language that reserved to them the "privilege

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[4](...continued)
with their interests in the soil itself. Unharvested natural shellfish, unlike cultivated shellfish, "in a very material sense, belong with the land." ***Sequim Bay Canning Co. v. Bugge***, 49 Wash 127, 131, 94 Pac. 922, 923 (1908). *Compare*, ***Edison Oyster Co. v. Pioneer Oyster Co.***, 22 Wn.2d 616, 157 P.2d 302, 307 (1945) ("There is no question but that the oyster seed, and the oysters resulting therefrom, constituted personal property.").

of hunting, fishing and gathering wild rice, upon the lands, rivers and lakes included in the territory ceded." Treaty with Chippewas, July 29, 1837, 7 Stat. 536. *See* ***Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin***, 760 F.2d 177, 182 (7th Cir. 1985); ***Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt***, 700 F.2d 341, 365 (7th Cir. 1983); ***Mille Lacs Band of Chippewa Indians v. Minnesota***, 124 F.3d 904, 933-34 (8th Cir. 1997), *cert. granted* __ U.S. __ (1998) (No. 97-1337).

Moreover, by holding that the Tribes have the right to enter and take shellfish from each and every parcel of privately owned tidelands in western Washington State, the decisions below mark an unprecedented departure from the limited right of access recognized by this Court's decisions in ***Winans*** and ***Seufert***. The Yakama's "famous" fishery on the shorelands adjacent to the Columbia River rapids was an "immemorial right like a ripened prescription" until it was cut off by Winans' fences and fishwheels. ***Winans***, 198 U.S. at 371, 374 (argument of the United States). The Court held in ***Winans*** that the treaty right to fish necessarily implied that the Indians "were given a right in the land -- the right of crossing it to the river -- the right to occupy it to the extent and for the purpose mentioned." 198 U.S. at 381.

But the Yakama's "right in the land" to gain access to the salmon that they were promised in their treaty cannot be equated to the right to harvest shellfish from each and every tideland parcel along Washington's coastlines. First, the United States sought not "a broad and vague servitude on all patented

lands . . . but only a clear and limited one on this particular small tract." ***Winans***, 198 U.S. at 373. As the ***Seufert*** Court held:

> [T]he "servitude" is one existing only where there was an habitual and customary use of the premises, which must have been so open and notorious during a considerable portion of each year that any person, not negligently or wilfully blind to the conditions of the property he was purchasing, must have known of them..

Seufert, 249 U.S. at 199.

Moreover, the ***Winans*** Court enunciated the Tribes' right of access by analyzing the nature of the resource. The fact that "shellfish are fish" adds nothing to the inquiry into the scope of tribal access to shellfish. The immobile shellfish resource at issue here differs markedly from the migratory salmon that was monopolized by the fish wheels in ***Winans*** and the non-Indian fishing in ***Fishing Vessel.*** Excluding Indians from the Private Owners' tidelands cannot deprive the Tribes of their ability to harvest shellfish from the hundreds of miles of public and tribally owned tidelands located throughout the treaty area.[5] The issues presented by the State and private petitioners do not undermine ***Winans'*** limited holdings.

Petitioners do not question the Tribes' right to take fish from public waters, or to take shellfish from those tidelands not

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[5] The United States' own evidence reflects that of 2,227 miles of tideland in Puget Sound and along the Strait of Juan de Fuca, 1,180 miles, or 53%, was in private ownership. By contrast 880 miles of tidelands was held by the State of Washington, with 113 miles located adjacent to Indian reservations and 54 miles in Federal ownership. Ex. US -181.

in private ownership free of the state regulation that applies to non-Indians. Petitioners do not purport to deny tribal access across an upland trail to a usual and accustomed fishing station, or to those beaches habitually used for reef nets and beach seines under the circumstances required by ***Winans*** and ***Seufert***. Petitioners do, however, dispute the refusal of the courts below to acknowledge the "serious questions," ***Antoine v. Washington***, 420 U.S. 194, 207-08 n.11 (1975), raised by an unprecedented interpretation of the Stevens treaties that allows the Tribes to enter upon over 150,000 parcels of private property to take resources from the land itself.

B. The Decision Below Conflicts With This Court's "Equal Footing" Precedent By Limiting The State's Ability To Establish Private Property Rights In Tidelands.

Under the decision below, Washington alone among the states is without the inherent sovereign authority to convey clear title to its tidelands, in conflict with this Court's equal footing cases from ***Pollard's Lessee v. Hagen***, 44 U.S. (3 How.) 212 (1845) through ***United States v. Alaska***, 521 U.S. 1 (1997). Respondents refuse to recognize that the tidelands at issue in this case lie at the core of the equal footing doctrine.

Petitioners have never disputed the authority of the federal government to make prestatehood reservations of interests in tidelands for legitimate sovereign purposes. But the Court must presume that Congress did not intend to do so unless that intent is "made very plain" by the statutory or treaty language. ***Utah Div. of State Lands v. United States***, 482 U.S. 193, 196-98, 201-02 (1987). The treaty right to take fish must

therefore be construed narrowly in relation to the State's tidelands, and the plain meaning of the proviso excluding Indians from staked or cultivated beds must be given effect.

Here, the courts below rejected application of the equal footing doctrine outright, reasoning that the doctrine cannot apply to prestatehood reservations of anything less than fee title. (App. 21-22) These holdings, so contrary to this Court's precedent that respondents make no attempt to defend them, are reason enough to grant the writ. Those reasons aside, however, the decisions below should be reviewed in order to confirm the right of the State of Washington to deal "with the lands under the tide waters within its borders according to its own views of justice and policy. . ." ***Shively v. Bowlby***, 152 U.S. 1, 26 (1894).

C. The Ninth Circuit Improperly Treats The Meaning Of Treaty Language As A Question of Historical Fact Reviewed For Clear Error, Rather Than A Question Of Law That Is Reviewed De Novo.

Treaty interpretation, no less than the interpretation of statutory or constitutional text, is uniquely a judicial function and not a fact-laden inquiry into the thought processes of those involved in the treaty-making process. The Ninth Circuit "reviewed [the] district court's findings of parties' intent in entering Indian treaties under the highly deferential clear error standard." (App. 16) (citations omitted) This unambiguous holding is dispositive of the United States' argument that the "extent to which the court of appeals deferred to any of the district courts findings is unclear." (United States Br. at 30)

As the Shellfish Growers demonstrate, the decision below marks a dangerous departure from established precedent requiring the appellate court to freely review ultimate issues of treaty interpretation. The "clear error" standard of review adopted by the Ninth Circuit allows treaty interpretation to turn on the paid testimony of expert historians as to what the treaty participants "intended" rather than a reasoned inquiry using established canons of interpretation.

D. The Interpretation Of The Shellfish Proviso Is A Matter Of Substantial Public Concern That Should Be Definitively Resolved By This Court.

The respondents' attempt to minimize the impact of the Court of Appeals decision ignores the enormous repercussions of the Ninth Circuit's decision to extend tribal usufructuary rights to privately owned property and its rejection of the equal footing doctrine to tribal claims of reserved easements in tidelands. Respondents' argument that the meaning of the shellfish proviso is "limited to this case" (U.S. Br. at 21; Tribes' Br. at 27) trivializes the effect of the rulings below on 150,000 property owners, most of whom were never made party to this action. The district court's implementation order condemns each owner's tidelands in a case area comprised of over 2,000 miles of beaches by establishing an unsolicited partnership with the local Indian tribe in the harvesting of any shellfish located on that owner's property. (App. 125-27) The order imposes federal court supervision, delegated to a special master, of all aspects of that unwanted partnership. (App. 128, 132-33)

Rather than a narrow ruling that has no precedential effect, the decision below will reverberate for decades as Private

Owners and Tribes litigate the disputes that will inevitably arise from this decision. That these owners have placed their faith in the federal court by complying with its decisions rather than engaging in "widespread defiance," ***Fishing Vessel***, 443 U.S. at 675, as was the case a generation ago, is all the more reason to issue the writ and reverse the decision of the Court of Appeals.

CONCLUSION

This Court should grant the Private Owners' petition and issue the writ.

RESPECTFULLY SUBMITTED this 8th day of March, 1999.

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